Supreme Court, U. S.
FILED
MAY 15 1980
MICHAEL RODAK, JR., CLERK

No. 79-1343

In the Supreme Court of the United States

OCTOBER TERM, 1979

CHARLES C. DIGGS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

LAWRENCE G. WALLACE
Acting Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOHN F. DEPUE
Attorney
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	12
Conclusion	25

CITATIONS

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144	24
Blachly v. *United States*, 380 F.2d 665	17, 18
Burton v. *United States*, 202 U.S. 344	16
Durland v. *United States*, 161 U.S. 306	13
Gouled v. *United States*, 273 F. 506	13
Gravel v. *United States*, 408 U.S. 606	24, 25
Gregory v. *United States*, 253 F.2d 104	18
Sandstrom v. *Montana*, 442 U.S. 510	23
Sansone v. *United States*, 380 U.S. 343	22
Silverman v. *United States*, 213 F.2d 405	18
United States v. *Boswell*, 565 F.2d 1338, cert. denied, 439 U.S. 819	22
United States v. *Brewster*, 408 U.S. 501	15, 16, 17, 24
United States v. *Brown*, 540 F.2d 364	13
United States v. *Bush*, 522 F.2d 641, cert. denied, 424 U.S. 977	13
United States v. *Edwards*, 458 F.2d 875, cert. denied, 409 U.S. 891	13
United States v. *Isaacs*, 493 F.2d 1124, cert. denied, 417 U.S. 976	16, 17

Cases—Continued Page

United States v. *Johnson*, 383 U.S. 169 17
United States v. *Keane*, 522 F.2d 534, cert. denied, 424 U.S. 976 13
United States v. *Lovasco*, 431 U.S. 783 24
United States v. *McNeive*, 536 F.2d 1245 13
United States v. *McPartlin*, 595 F.2d 1321 22
United States v. *Meadows*, 598 F.2d 984 17
United States v. *Morales*, 577 F.2d 769 22
United States v. *Stanford*, 589 F.2d 285, cert. denied, 440 U.S. 983 17
United States v. *States*, 488 F.2d 761, cert. denied, 417 U.S. 909 13
United States v. *Waskow*, 519 F.2d 1345 22
Weiss v. *United States*, 122 F.2d 675, cert. denied, 314 U.S. 687 17

Statutes:

Legislative Branch Appropriation Act, 1978, Pub. L. No. 95-94, 91 Stat. 653 14
18 U.S.C. 1001 ..... 2, 3, 12, 13, 15
18 U.S.C. 1341 ..... 2, 12, 13

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1343

CHARLES C. DIGGS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 613 F.2d 988.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1979. A petition for rehearing was denied on January 30, 1980. The petition for a writ

of certiorari was filed on February 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's convictions were improperly based on violations of internal rules of the House of Representatives.

2. Whether the district court improperly instructed the jury on the question of intent.

3. Whether the investigation of petitioner's activities and his subsequent criminal trial violated the Speech or Debate Clause.

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted on 11 counts of mail fraud, in violation of 18 U.S.C. 1341, and 18 counts of concealing a material fact in a matter within the jurisdiction of a government agency, in violation of 18 U.S.C. 1001. He was sentenced to concurrent terms of three years' imprisonment on each count. A divided panel of the court of appeals affirmed (Pet. App. 1a-43a).

1. Petitioner is a Member of the United States House of Representatives. He has represented Michigan's 13th Congressional District since 1955. He was charged with devising and implementing a scheme to defraud the United States and to obtain money from the United States Treasury "by false and fraudulent pretenses, representations and promises" (Indictment Counts 1-11 ¶ 6). In particular, the indictment alleged that petitioner inflated the salaries of three of his congressional employees and then received portions of the increased salaries as kickbacks that he used to pay personal, business, and congressional expenses. The indictment also alleged that petitioner placed two persons on the congressional payroll who did not work for the House of Representatives but who worked solely for petitioner personally and for his business in Detroit. The 11 mail fraud counts were based on the interstate mailing of salary checks to one of the employees whose congressional salary was improperly increased and to the two employees who were improperly added to petitioner's congressional payroll. The 18 concealment counts, in violation of 18 U.S.C. 1001, were based on petitioner's filing of Payroll Authorization Forms, covering all five of the employees involved in the illegal scheme, with the House of Representatives Office of Finance. None of the Payroll Authorization Forms specified in the indictment revealed that the funds to be disbursed were to be used for petitioner's benefit and not for the benefit of the employee recipients.

a. The evidence at trial showed that in October 1973 petitioner placed his secretary and office manager, Jean Stultz, on the payroll of the House District of Columbia Committee, of which petitioner was the chairman. He then diverted her committee salary to pay his creditors. Although Stultz had no actual duties as a member of the committee staff, she began receiving a $1,200 monthly check as a committee staff

member, in addition to her $800 monthly salary as a member of petitioner's personal staff. Petitioner informed her that the additional salary was not intended as personal compensation; rather, it was to be used to pay "certain bills that needed to be paid" (II Tr. 39-42). Petitioner told Stultz that he would instruct her concerning which bills to pay with the salary funds. Stultz placed her additional salary in a checking account and used it "for whatever purposes the Congressman indicated" (II Tr. 42; Pet. App. 4a-5a).[1] Each month Stultz provided petitioner with a list of accounts due; petitioner reviewed the list and directed her to pay certain bills from the inflated portion of her salary. Stultz then withdrew cash from the account, purchased money orders or cashiers' checks, placed petitioner's name on the instruments, and mailed them to the creditors (II Tr. 46-47, 106; Pet. App. 6a). Stultz expended a total of $20,413 of her salary to pay petitioner's personal and congressional obligations (Pet. App. 5a n.9).[2]

[1] The double check arrangement lasted until August 1974, when Stultz's committee salary was increased to an amount roughly equivalent to the total amount she previously received in both checks together (II Tr. 43; Govt. Exh. 4d). When Stultz informed petitioner in 1976 that she no longer wished to participate in the scheme, her salary was reduced from $37,355 to $22,700 with no commensurate change in her duties. Prior to her resignation in 1976, Stultz's income was again increased for a two-month period to permit payment of taxes on her inflated salary (Pet. App. 5a-6a & n.11).

[2] More than half of this amount was used for petitioner's personal expenses, including life insurance premiums and home mortgage payments (Pet. App. 5a n.9). Almost one-

In like manner and for a like purpose, petitioner increased the salary of Felix Matlock, one of his Detroit field representatives. Petitioner raised Matlock's gross annual salary from $14,500 in July 1975 to $39,600 by the end of 1976. Following the salary increase, either petitioner personally or Stultz, acting on petitioner's instructions, directed payment of Detroit congressional office expenses from the fund created by the inflated salary (II Tr. 121-129; III Tr. 204-208; Pet. App. 7a-8a, 17a). In December 1976, when Matlock stopped paying petitioner's Detroit congressional expenses,[3] his annual salary was reduced from $39,600 to $20,000 "with no apparent change in duties" (Pet. App. 8a).

In a similar effort to meet his financial obligations, petitioner raised the salary of Ofield Dukes, a staff consultant, from $12,000 in 1973 to $37,300 in 1975 (II Tr. 132-134; IV Tr. 62-63; Pet. App. 8a). In compliance with petitioner's instructions, Dukes used the increase to make payments to a newspaper, a recording studio, and a radio station for programming sponsored by the House of Diggs, a Detroit funeral home operated by petitioner (II Tr. 134-139; III Tr. 3-9; IV Tr. 53-59; Pet. App. 8a). When Dukes

third of the fund was used to defray expenses related to petitioner's position as a Member of Congress. These expenses included rent for petitioner's district offices in Detroit, political contributions, and printing costs (*ibid.*).

[3] The expenses included rent and utilities for the Detroit congressional office, the amount due on a note on a mobile office, and the cost of petitioner's Detroit radio program (II Tr. 206-213).

ceased to pay petitioner's obligations, his salary was decreased to $12,000 (Pet. App. 8a-9a).

Finally, petitioner placed two employees of the House of Diggs on his congressional payroll. In 1974 petitioner hired Jeralee Richmond to work as a bookkeeper at the funeral home. Although petitioner did not mention that the position would involve duties related to congressional business, he told Richmond that she would be compensated from the congressional payroll (IV Tr. 138-143). Between July 1974 and August 1976, Richmond's entire salary was paid from the congressional payroll. During this period, she devoted approximately 80% of her time to bookkeeping for the funeral home; the remaining time was devoted to dealing with the problems of petitioner's constituents who came to the funeral home seeking assistance (IV Tr. 142-147; Pet. App. 9a).[4]

George Johnson, a certified public accountant, was the second House of Diggs employee placed on the congressional payroll. Congressional funds were used to compensate him for services rendered to the funeral home and to petitioner personally. Johnson was placed on the congressional payroll in July 1973 at an annual salary of $32,175; he performed no financial or accounting work for Congress (IV Tr. 166-172; Govt. Exh. 16a). Johnson objected to the com-

[4] Richmond, who previously had been employed as a bookkeeper for the funeral home from 1949 to 1967, received a total of $20,291.64 from the congressional payroll during the 1974-1976 period (Pet. App. 9a nn.25, 26).

pensation arrangement, but petitioner convinced him to credit the Treasury checks against petitioner's personal and business indebtedness (IV Tr. 173-176).[5] Johnson left the congressional payroll in December 1974 (IV Tr. 173).

The government's evidence also established that congressional staff members are compensated from a "clerk-hire allowance," which is an appropriation for the salaries of staff personnel employed by Members of Congress in the discharge of their official and representative duties (I Tr. 12; Pet. App. 11a & n.33). On hiring a new employee or adjusting the amount of an existing employee's compensation, the employing Congressman must personally sign and submit a "Payroll Authorization Form" to the House of Representatives Office of Finance (I Tr. 14, 25). The Chief of that Office testified that the clerk-hire allowance is used to pay "compensation to employees for their performance of official duties" (I Tr. 30). Petitioner personally signed monthly Payroll Authorization Forms authorizing salary payments to Stultz, Matlock, Dukes, Richmond, and Johnson (I Tr. 32; III Tr. 24-27; Govt. Exhs. 1a-1*l*, 7a-7r, 10a-10d, 13a-13g,

[5] Johnson received a total of $19,166.02 from the congressional payroll (Govt. Exh. 82; Pet. App. 10a n.29).

At trial, petitioner asserted that he hired Johnson as an advisor to draw upon his knowledge and expertise concerning black economic development projects (Pet. App. 10a). Petitioner admitted, however, that Johnson never furnished him any written reports or worked on any legislative matter (VI Tr. 174-175).

16a-16t).[6] Similarly, in his capacity as chairman of the House Committee on the District of Columbia, petitioner authorized Stultz's appointment and her compensation as a committee staff member (Govt. Exhs. 4a-4d).[7]

b. Petitioner did not dispute that portions of his employees' salaries were used to defray personal and office expenses. Instead, he asserted that the employees' salaries were not increased for that purpose and that the payments were not kickbacks but voluntary contributions (*e.g.*, VII Tr. 101). Petitioner testified that Stultz's salary was increased from $14,000 to more than $33,000 because her office responsibilities had expanded (VII Tr. 104-105). He also stated that Stultz lent him part of her salary to pay his bills, that she expressed a willingness to pay the bills when he "asked her [to] help out" (VI Tr. 101-103, 108; VII Tr. 12), and that she could have terminated the practice at any time (VI Tr. 109). Likewise, petitioner testified that he knew Matlock and Dukes were using part of their salaries to pay office expenses, but he steadfastly refused to state that he increased their salaries specifically for

[6] The forms authorizing the appointment of Richmond and Johnson stated that Richmond was hired as petitioner's secretary (Govt. Exh. 13a) and that Johnson was appointed a "special consultant" (Govt. Exh. 16a).

[7] The Payroll Authorization Forms executed by petitioner showed that Stultz was appointed to the District of Columbia Committee on April 1, 1973, at a salary of $14,000; that on May 1, 1974, her salary was increased to $17,500; and that on August 1, 1974, it was further increased to $36,000.

that purpose, and he also refused to admit that he personally directed his employees to make such payments (VI Tr. 118; VII Tr. 52, 55, 57, 65, 70-76, 86, 89-93; Pet. App. 8a, 18a).

c. At the conclusion of the evidence, petitioner specifically requested an instruction on the defense of good faith. Petitioner asked the district court to tell the jury that, if he acted with "a good faith belief that it was within a Congressman's discretion to compensate his employees from the clerk-hire allowance for paying official expenses" (Pet. 5), then he should be acquitted on those counts involving the use of kickbacks to defray congressional office expenses. The court agreed to give a good faith instruction but said that it would also inform the jury that the pertinent question was whether petitioner approved the payroll authorizations intending that the employees would actually receive and have the use of their full salaries or whether he did so intending that part of the salaries would be remitted for the payment of his obligations. When petitioner was told that the good faith instruction would be augmented in this manner, he withdrew his request (VIII Tr. 10). The district court then instructed the jury as follows (Pet. App. 23a n.67):

> Good faith is a defense to an offense such as mail fraud, one of the elements of which is fraudulent intent.
>
> The question is whether [petitioner] at the time he approved the payroll authorizations representing that certain employees would be paid specific salaries intended that those employees

> would actually receive and have the complete use of those salaries, or did he intend that a portion of the salary would be remitted by the employee for the payment of his obligations. What I have said respecting good faith as a defense in a mail fraud charge is also applicable to false official statement charges.

3. A divided panel of the court of appeals affirmed (Pet. App. 1a-43a). The court held that there was ample evidence from which the jury could have concluded that petitioner increased the salaries of his congressional staff members and placed additional employees on the congressional payroll for the purpose of using salary payments from the clerk-hire allowance to defray his personal, business, and congressional expenses (Pet. App. 17a-18a, 27a-29a). The court ruled that the clerk-hire allowance should not have been used for this purpose but that the monies so appropriated were intended for the "sole use and benefit" of congressional staff members as salary for services rendered in the performance of official congressional duties (*id.* at 12a, 18a). The court reasoned that "the allowance for clerk-hire and the allowance for district office expenses were separate and distinct" and that "[n]o House regulation or order authorized the commingling of these funds, either directly, or, as in this case, indirectly" (*id.* at 13a). In light of its decision that the use of clerk-hire funds for congressional office expenses was unlawful, the court held that petitioner was not entitled to an instruction that the jury should acquit

him if it found that he had a good faith belief that staff salary payments could properly be used to defray his district office expenses (*id.* at 22a-24a).

Judge Leventhal dissented in part (Pet. App. 33a-43a). He focused on the 13 counts of the indictment involving the mailing of salary checks to the employee Matlock and the filing of Payroll Authorization Forms covering salary payments to Stultz, Matlock, and Dukes. Apparently because Paragraph 13(a) of Counts 1-11 of the indictment alleged that petitioner increased the salaries of Stultz, Matlock, and Dukes "to pay for various personal, business, and House of Representatives expenses," Judge Leventhal concluded that a guilty verdict on the counts involving those employees could have been based solely on a finding that the salary increases were intended to pay congressional office expenses. Under these circumstances, Judge Leventhal thought that petitioner was entitled to an instruction that, if he "acted with a good faith belief in his right to compensate his employees for paying official congressional expenses, he should be acquitted of the pertinent counts" (Pet. App. 34a). Although Judge Leventhal found no fault with the seven mail fraud and nine concealment convictions involving the employees Richmond and Johnson, he would have remanded for resentencing on these 16 counts to ensure that the district court's sentencing decision was not affected by the convictions involving the other three employees.

ARGUMENT

1. a. Petitioner contends first (Pet. 6-16) that he was improperly convicted because the courts below usurped the function of a coordinate branch of government by determining, as a threshold matter, that internal rules of the House of Representatives prohibited the use of clerk-hire funds for the payment of congressional office expenses. This argument is groundless; no such determination was essential to any issue presented by the case.

Petitioner was not charged with or convicted of violating House rules relating to the use of clerk-hire funds.[8] He was convicted of mail fraud, in violation of 18 U.S.C. 1341, and concealing material facts in statements to a federal agency, in violation of 18 U.S.C. 1001. The gravamen of the fraudulent scheme alleged in the mail fraud counts was obtaining funds appropriated for congressional staff salaries and using them for other purposes. The scheme was fraudulent because petitioner obtained the funds through representations that they would be disbursed as employee salaries; in fact, however, petitioner intended that they would be used to pay his personal, business, and congressional expenses. The underlying fraud described in the mail fraud counts was ac-

[8] Indeed, the indictment did not even mention the violation of House rules regarding the use of clerk-hire funds. Instead, it simply alleged that petitioner devised a scheme to defraud the United States and to obtain money by false pretenses and representations and that he sought to effectuate the scheme by submission of inflated or fraudulent payroll authorizations.

complished through the concealment of material facts described in the counts charging violations of 18 U.S.C. 1001. The critical fact for both kinds of offenses was that petitioner obtained money from the United States Treasury by deliberately hiding his true plans for the funds and by deceptively stating to the House Office of Finance that the funds would be paid as salaries.

The federal courts have recognized that 18 U.S.C. 1341's reference to "any scheme or artifice to defraud" is broad enough to include a wide range of deceitful conduct. *Durland* v. *United States*, 161 U.S. 306 (1896); *United States* v. *McNeive*, 536 F.2d 1245, 1247-1249 & nn.3, 5, 10 (8th Cir. 1976); *United States* v. *States*, 488 F.2d 761, 764 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974); *Gouled* v. *United States*, 273 F. 506, 508 (2d Cir. 1921). Application of the statute does not depend on whether the particular fraudulent scheme violates some other law or regulation. See, *e.g.*, *United States* v. *Brown*, 540 F.2d 364, 374 n.7 (8th Cir. 1976); *United States* v. *Bush*, 522 F.2d 641, 646 n.6 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976); *United States* v. *States*, *supra*, 488 F.2d at 767; *United States* v. *Edwards*, 458 F.2d 875, 880 (5th Cir.), cert. denied, 409 U.S. 891 (1972); *United States* v. *Keane*, 522 F.2d 534, 544 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976). Accordingly, it was unnecessary for the government to establish or for the courts below to decide that petitioner's application of clerk-hire funds to pay office and personal expenses violated the internal regulations of the House of Rep-

resentatives.[9] The scheme violated the mail fraud statute in any event.[10]

---

[9] Although it was unnecessary for the court of appeals to determine that use of clerk-hire funds to pay congressional office expenses violated House regulations, the court's opinion in this regard was plainly correct. In the first place, the Legislative Branch Appropriation Act, 1978, Pub. L. No. 95-94, 91 Stat. 653, 667, provides that the clerk-hire allowance is to be used to provide compensation "[f]or staff employed by each Member in the discharge of his official and representative duties" (Pet. App. 11a & n.33). As the court of appeals stated (*id.* at 13a), the statute does not accord legislators the unfettered power to divert clerk-hire funds, intended for compensation, to pay expenses for which Congress has established other allowances. The statute recognizes only the Members' discretion to define the duties of their employees. That is why the Chief of the House Finance Office testified that the sole permissible purpose for amounts claimed on Payroll Authorization Forms, which authorized disbursement of clerk-hire funds, was "payment for compensation to employees for their performance of official duties" (I Tr. 29-30). As the court of appeals observed (Pet. App. 12a), the language of the Payroll Authorization Form itself makes clear that the intended purpose of the fund is employee salary. See, *e.g.*, Govt. Exh. 16a; compare Govt. Exh. 21c (authorizing reimbursement for "official Office expenses").

[10] The evidence fully established that petitioner possessed the requisite intent to defraud when he executed the Payroll Authorization Forms. He represented on the documents that the disbursements were to be used for employees' salaries. Moreover, as the concurring opinion notes (Pet. App. 32a), petitioner's false certification on congressional office expense vouchers that payment for the claimed office expenses had not been received shows that he intentionally concealed his misapplication of clerk-hire funds from the House Finance Office. Finally, petitioner's directions to Stultz not to maintain records of her financial transactions on his behalf further demonstrate his desire to conceal the actual disposition of the inflated salaries (II Tr. 129).

Similarly, petitioner violated 18 U.S.C. 1001 when he knowingly and willfully concealed a material fact in the Payroll Authorization Forms he filed with the House Office of Finance. The material fact concealed was the use to which petitioner intended to put the funds. He intended to use them not to pay the salaries of his congressional employees but to defray his own expenses, and he did not reveal this when he filed the forms that gave rise to the charges under Section 1001. Whatever the proper construction of internal House rules, petitioner's reasons for seeking increased staff salary payments were certainly material to the purposes for which the House Office of Finance requires the filing of Payroll Authorization Forms. When petitioner hid his true reasons for seeking the payments, he violated Section 1001, regardless of the provisions of any House rule.

b. There is no merit to petitioner's contention (Pet. 10-11) that his prosecution constituted an unwarranted intrusion into the prerogative of Congress to punish the misconduct of its Members. In *United States* v. *Brewster*, 408 U.S. 501 (1972), this Court squarely rejected an identical claim, noting that its adoption "would render Members of Congress virtually immune from a wide range of crimes simply because the acts in question were peripherally related to their holding office" (*id.* at 520).[11]

---

[11] *Brewster* also rejected several other arguments similar to those made by petitioner. Petitioner suggests, for example, that discipline for misconduct as a Member of Congress

Nor does the fact that the fraudulent scheme was perpetrated upon the Congress itself lend any support to petitioner's submission. As this Court held in *Burton* v. *United States*, 202 U.S. 344, 368 (1906):

> There can be no reason why the Government may not, by legislation, protect each Department against * * * corruption or inefficiency in the management of public affairs. A Senator cannot claim immunity from legislation directed to that end, simply because he is a member of a body which does not owe its existence to Congress, and with whose constitutional functions there can be no interference.

---

should be "politically sensitive" (Pet. 10), but this Court noted that the political considerations operating within Congress "could result in far greater harassment than a conventional criminal trial with the wide range of procedural protections for the accused * * *." 408 U.S. at 520. Likewise, although petitioner argues (Pet. 12) that discretion to prosecute Members of Congress is subject to abuse by the Executive Branch, the Court in *Brewster* stated that "[t]he potential for harassment by an unscrupulous member of the Executive Branch may exist, but this country has no tradition of absolute congressional immunity from criminal prosecution" (408 U.S. at 522 n.16). Moreover, this possibility "finds little real support in history" (*id.* at 523). See also *United States* v. *Isaacs*, 493 F.2d 1124, 1144 (7th Cir.), cert. denied, 417 U.S. 976 (1974).

See also *United States* v. *Brewster*, *supra*, 408 U.S. at 515-516; *United States* v. *Johnson*, 383 U.S. 169, 185 (1966). Petitioner's status as a Congressman does not exempt his offenses from the operation of the ordinary criminal laws. *United States* v. *Isaacs*, 493 F.2d 1124, 1144 (7th Cir.), cert. denied, 417 U.S. 976 (1974).

c. Petitioner argues in addition (Pet. 13-16) that, because congressional regulations governing the use of clerk-hire funds were ambiguous, he did not receive adequate notice that his conduct was unlawful. This is nothing more than a different version of petitioner's contention that his fraudulent scheme was not illegal because it did not violate any specific law or regulation governing the use of clerk-hire funds. But, as we have already discussed, petitioner was not convicted of violating a House regulation but of engaging in a fraudulent scheme to divert congressional payroll funds through the use of the mails and false official statements. There is nothing vague or ambiguous about the criminal statutes that petitioner was accused of violating. As one federal court has said, the concept of fraud "needs no definition; it is as old as falsehood and as versable as human ingenuity." *Blachly* v. *United States*, 380 F.2d 665, 671 (5th Cir. 1967), quoting *Weiss* v. *United States*, 122 F.2d 675, 681 (5th Cir.), cert. denied, 314 U.S. 687 (1941). See, *e.g.*, *United States* v. *Meadows*, 598 F.2d 984, 988 (5th Cir. 1979); *United States* v. *Stanford*, 589 F.2d 285, 296 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979). It encompasses any

" 'scheme reasonably calculated to deceive persons of ordinary prudence and comprehension.' " *Blachly* v. *United States*, *supra*, 380 F.2d at 671, quoting *Silverman* v. *United States*, 213 F.2d 405 (5th Cir. 1954). The jury determined that petitioner conducted the payroll scheme with the intent to defraud, and it follows from that finding that petitioner knew his scheme violated the standards of "moral uprightness, * * * fundamental honesty, fair play and right dealing" that the mail fraud and false statement statutes were designed to protect. *Gregory* v. *United States*, 253 F.2d 104, 109 (5th Cir. 1958).

2. Petitioner next contends (Pet. 16-17) that the district court's instruction concerning good faith deprived him of the defense that he believed it was permissible to use employee salary funds to pay congressional office expenses. This argument is unavailing.

In the first place, petitioner is incorrect in representing (*e.g.*, Pet. 3 n.1) that the alleged deficiency of the intent instruction affects all the counts in the indictment. As Judge Leventhal recognized in his partial dissent (Pet. App. 33a-34a, 43a), only the 13 counts involving the employees Stultz, Matlock, and Dukes included allegations that the improperly increased salaries were used to pay congressional office expenses as well as petitioner's personal and business expenses. The 16 counts involving Richmond and Johnson, employees of the House of Diggs funeral home, contained no such allegations. Paragraph 9 of the indictment, for example, alleged that congressional payroll funds were paid to Richmond "for

her work as an employee of the House of Diggs, Inc." Similarly, Paragraph 10 alleged that Johnson received clerk-hire funds "for his work as an accountant for [petitioner] personally, his family, and the House of Diggs, Inc." See also Indictment Counts 1-11 ¶ 13 (b), (c); Counts 21-29 ¶ 2. Thus, even if petitioner were entitled to the good faith instruction he requested, his convictions on 16 counts of the indictment would be unaffected, and the concurrent three-year terms of imprisonment to which petitioner was sentenced on those counts would remain well below the five-year maximum sentence that could have been imposed on each count of the indictment.

In any event, the district court's instruction was proper. The court charged the jury that petitioner should be acquitted if he intended his employees to have full use of the salaries they were paid. The court further charged that the good faith defense was not available if petitioner intended that part of his employee's salaries should be surrendered to him to pay his personal, business, and congressional expenses. As the court of appeals observed (Pet. App. 23a; emphasis omitted), the instruction to the jury did "no more than pose the question of good faith exactly as [petitioner] himself had presented the issue at trial." [12]

---

[12] The court of appeals explained (Pet. App. 23a):

> [Petitioner] denied ever having increased the salaries of his employees with the intention of using the excess to pay his bills; the testimony of his employees was uniformly to the contrary. [Petitioner] claimed they volunteered the money; the employees said payment to [peti-

Although the record is not entirely clear, petitioner apparently based his defense on the claim that his employees volunteered a portion of their salaries to pay his congressional office expenses.[13] Instead of admitting that he increased employee payroll authorizations for the purpose of obtaining additional funds to cover official expenses and asserting that he considered the practice permissible, petitioner refused to acknowledge any causal connection between the salary increases and the employees' payment of his expenses (*e.g.*, VII Tr. 64-65, 70-76, 89-91). Accordingly, there is no factual basis for the dissent's assumption (Pet. App. 34a) and petitioner's contention (Pet. 5) that his defense was based on a good faith belief that salary increases could be expended for official purposes not related to employee compensation. As the court of appeals observed (Pet. App. 18a), the only issue of intent presented by the evidence was whether petitioner, in submitting the Payroll Authorization Forms, intended that the resulting disbursement be used for salaries or some other purpose.[14]

---

tioner] of part of their inflated salaries was virtually a condition of employment. The employees also pointed to the remarkable rise in their salaries when they began payments to or for [petitioner], and the immediate drastic reduction when each ceased being a part of the scheme. The trial judge properly called upon the jury to resolve this issue.

[13] Petitioner testified on direct examination that the practice began when Stultz asked for his opinion whether it was legal for her to "make available her funds from her salary to pay [office expenses]" (VI Tr. 99). Petitioner assertedly responded by saying: "As far as I know you can do anything you want with your salary" (*ibid.*). The particular expense with which this testimony was concerned was the cost of a portrait of petitioner to be hung in the chambers of the standing committee of which he was the chairman. Petitioner's subsequent testimony regarding payments by Stultz shows that he treated this expense as an office expense analogous to the telephone bill for his Detroit district office (VI Tr. 101-102).

[14] The petition does not acknowledge or respond to the court of appeals' characterization of the defense presented at trial, and it provides no record citations in support of its statement that petitioner's good faith belief in the propriety of paying congressional office expenses out of the clerk-hire allowance was the defense "consistently asserted by him throughout the trial" (Pet. 5). Judge Leventhal's opinion offers one record reference in support of the proposition that petitioner "freely admitted during the trial that he had used some of the salary increases to reimburse employees for official expenses" (Pet. App. 34a & n.2). Neither the page cited by the dissent (VI Tr. 118) nor any of the other transcript references of which we have been advised (VI Tr. 127-128; VII Tr. 64-65, 92) contains a clear statement by petitioner that he deliberately sought salary increases for his employees in order to enable them to pay his office expenses. Rather, petitioner merely indicated an awareness that his employee Matlock (and perhaps his employee Dukes as well) used a portion of his salary to defray the cost of operating petitioner's district office in Detroit. The cited testimony—a few brief statements in a transcript running several hundred pages—is completely consistent with the theory of the defense discerned by the court of appeals (*i.e.*, that petitioner's employees voluntarily paid his obligations and did not do so as a condition of receiving their increased salaries) and certainly does not constitute a clearly asserted defense, steadfastly maintained throughout trial, that petitioner, in the good faith belief that it was proper to do so, increased his employees' salaries on the prearranged understanding that the additional amounts would be used for congressional office expenses.

In any event, as we explain in the text (see pages 12-13, *supra*, and pages 22-23 *infra*), petitioner was not entitled to the unadorned instruction he sought on the exculpatory effect

The district court instruction properly highlighted that question for the jury's resolution. See *United States* v. *Boswell*, 565 F.2d 1338, 1343 (5th Cir.), cert. denied, 439 U.S. 819 (1978); cf. *United States* v. *McPartlin*, 595 F.2d 1321, 1341 (7th Cir. 1979) (defense evidence inconsistent with an affirmative defense renders unnecessary an instruction on the defense). Although a defendant is generally entitled to have the jury charged on his theory of the case, it is well settled that an instruction should not be given if it lacks an evidentiary basis. See, *e.g.*, *Sansone* v. *United States*, 380 U.S. 343, 349-350 (1965); *United States* v. *Morales*, 577 F.2d 769, 774 (2d Cir. 1978); *United States* v. *Waskow*, 519 F.2d 1345, 1347 (8th Cir. 1975).

Moreover, even if petitioner did believe that clerk-hire funds could properly be used for congressional office expenses, that belief would not have been a defense to the charges against him. As we have ex-

---

of his alleged good faith belief in the propriety of using clerk-hire funds for district office expenses. Even if petitioner entertained such a belief, it did not entitle him to mispresent to the House Office of Finance the purpose for which the clerk-hire funds were sought. Moreover, as Judge Leventhal observed (Pet. App. 33a-34a, 43a), petitioner's apparent disagreement with the court of appeals' characterization of his defense is relevant to only 13 of the 29 counts on which he was convicted. Particularly in light of the concurrent sentences imposed on all counts, there is no need for this Court to grant review to resolve the essentially factual question whether there is sufficient evidentiary basis in the record to support petitioner's claimed entitlement to the good faith instruction he requested.

plained (see pages 12-13, *supra*), the gravamen of petitioner's illegal scheme was the fraudulent method by which he obtained salary funds for purposes other than salary. Even if one such non-salary purpose was legitimate, petitioner still was not justified in misrepresenting to the House Office of Finance that the funds were sought for salary purposes only.

There is no substance to petitioner's assertion (Pet. 17) that the district court's good faith instruction effectively eliminated the question of intent from the jury's consideration. The trial judge charged the jury that "[g]ood faith constitutes a complete defense" to charges of mail fraud or false official statements (Pet. App. 22a n.67). He further explained that one who acts on the basis of an honestly held opinion or belief is not chargeable with fraudulent intent even though that opinion or belief is erroneous. Finally, the court instructed that evidence showing only an error in judgment does not establish fraudulent intent. The question of intent was thus properly left to the jury, and there was no directed verdict of guilty on any element of the offenses with which petitioner was charged.[15]

---

[15] Petitioner's reliance on *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), is misplaced. In *Sandstrom*, the trial court's instruction to the jury included a potentially irrebuttable presumption that a defendant intends the natural and probable consequences of his acts. Here, by contrast, the instruction on intent was fully consistent with petitioner's defense, and far from eliminating the issue from the jury's consideration, it made it clear that proving fraudulent intent was an essential element of the government's proof on all counts.

3. Petitioner's final contention (Pet. 18) is that the investigation of his offenses and his subsequent prosecution violated the Speech or Debate Clause because his employees were asked to disclose their official responsibilities in matters of legislative concern. Petitioner did not raise this issue in the court of appeals, and he therefore may not pursue it now in this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event the claim is specious.

The Speech or Debate Clause "does not prohibit inquiry into activities that are * * * not a part of the legislative process itself." *United States* v. *Brewster*, *supra*, 408 U.S. at 528. The Clause does not privilege a Member of Congress to "violate an otherwise valid criminal law" solely because he can allege some tenuous connection to his preparation for or implementation of legislative acts. *Gravel* v. *United States*, 408 U.S. 606, 626 (1972). Fraud, like taking a bribe, is obviously "no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator." *United States* v. *Brewster*, *supra*, 408 U.S. at 526. The investigation and prosecution of petitioner's illegal activities did not implicate the Speech or Debate Clause in any way, since none of petitioner's legislative acts were called into question.[16]

[16] Petitioner does not even suggest how the investigation of his activities might have involved legislative matters protected by the Speech or Debate Clause. Although submission of employee pay authorizations may fall within the ambit of a Congressman's official duties, such acts are not protected by the Clause. As this Court explained in *Gravel* (408 U.S. at 625):

> That [Members of Congress] generally perform certain acts in their official capacity as [Members of Congress] does not necessarily make all such acts legislative in nature.* * *
>
> Legislative acts are not all-encompassing. The heart of the [Speech or Debate] Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

LAWRENCE G. WALLACE *
Acting Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOHN F. DEPUE
Attorney

* The Solicitor General is disqualified in this case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 319948 306